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UNITED STATES DISTRICT COURT OF CALIFORNIA

NORTHERN DISTRICT

CYNTHIA GUTIERREZ, JOSE HUERTA, SMH, RH and AH, Plaintiffs, v. SANTA ROSA MEMORIAL HOSPITAL, ST. JOSEPH HEALTH and DOES 1-50, inclusive, Defendants.	Case No.: 3:16-CV-02645-SI **NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER PURSUANT TO FRCP 26(c)(1)(A); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PROTECTIVE ORDER** Date: March 17, 2017 Time: 9:00 a.m. Courtroom.: 1 Judge: Honorable Susan Illston MSC Date: Not set Pre-Trial Conf: 10/10/17 Trial Date: 10/23/17

TO PLAINTIFF AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that at 9:00 a.m. on March 17, 2017 in Courtroom 1 of the 17th Floor, of the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California, Defendants SANTA ROSA MEMORIAL HOSPITAL and ST. JOSEPH HEALTH SYSTEM ("Defendants") will, and hereby do, move the Court for a protective order in this matter.

The Motion is made pursuant to Federal Rules of Civil Procedure Section 26(c)(1)(A) and the Court's general authority to rule on matters to protect the interests of justice.

Defendants ask that pursuant to FRCP 26(c)(1)(A) this Court prohibit and forbid Plaintiffs from taking the deposition of "The person(s) most knowledgeable re all peer review proceedings pertaining to the events regarding CYNTHIA GUTIERREZ…."

This motion is based upon this notice of motion, the ensuing memorandum of points and authorities, the Declaration of Brett Schoel, the pleadings on file with the Court, and upon any oral argument which may be presented at the time of the hearing.

Respectfully submitted,

Dated: February 7, 2017

LA FOLLETTE, JOHNSON,
DE HAAS, FESLER & AMES

By: /s/
BRETT SCHOEL
Attorneys for Defendants SANTA ROSA MEMORIAL HOSPITAL and ST. JOSEPH HEALTH

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUES

Plaintiffs Cynthia Gutierrez, Jose Huerta, SMH, RH and AH ("Plaintiffs") have noticed the deposition of "the person(s) most knowledgeable re all peer review proceedings pertaining to the events regarding CYNTHIA GUTIERREZ involving her care and treatment and lack thereof at SANTA ROSA MEMORIAL HOSPITAL." In conjunction with this notice, Plaintiffs have also made a Request for Production of Documents, which request includes writings, recordings, and reports that are part of the peer review process.

Defendants Santa Rosa Memorial Hospital ("SRMH") and St. Joseph Health System ("SJHS" collectively with SRMH "Defendants") respectfully request this Court grant a protective order prohibiting and forbidding the noticed deposition and discovery request pursuant to Federal Rule of Civil Procedure 26(c)(1)(A).

II. STATEMENT OF FACTS

On February 25, 2015 at 0300, Ms. Gutierrez presented to the SRMH emergency department with complaints of congestion, cough, nerve pain and shortness of breath. She suffered from longstanding medical conditions, which included diabetes and end-stage renal disease. At or around 0700, once the physicians believed Ms. Gutierrez was stable, she was discharged. At some point after her discharge, Ms. Gutierrez collapsed in the waiting room and required resuscitation. She was transferred to the intensive care unit and eventually to the Kentfield Rehabilitation Center.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 26(c)(1)(A) permits a federal court, upon a motion brought by a party, to grant a protective order "forbidding the disclosure or discovery." This protective order can be issued to prevent a party from conducting discovery into privileged information. In the federal courts privileges are governed by Rule 501 of the Federal Rules of Evidence, which provides in full:

> The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:
>
> the United States Constitution;
> a federal statute;
> or rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Rule 501 is not a ridged application of the law but, rather, one that permits "flexibility to develop rules of privilege on a case by case basis." *University of Pa. v. EEOC*, 493 U.S. 182, 119 (1990) (emphasis added). The language of Rule 501 reflects Congress' intent to define evidentiary privileges based upon the "reason and experience" of the Court. It "manifests a Congressional intent 'not to freeze the law of privilege' but to provide federal courts with the flexibility to develop rules of privilege on a case-by-case basis." *Williams v. Univ. Med. Ctr. Of S. Nev.*, 760 F.Supp.2d 1026, 1030 (D. Nev. 2010) *citing Trammel v. United States*, 445 U.S. 40, 47 (1980). When deciding whether or not a privilege should apply in a specific case, the Court must "look to 'reason and experience' in assessing the applicability of a yet unrecognized privilege." *Nilavar v. Mercy Health Sys.*, 2010 F.R.D. 597, 605 (S.D. Ohio 2002).

In a federal question case, "As a matter of comity, federal courts should attempt to ascertain what interests inspire relevant state doctrine and should take into account the views of state authorities about the importance of those interests." *Kelly v. City of San Jose*, 114 F.R.D. 653, 656 (N.D. Cal. 1987). If a state has created a specific privilege, its citizens "should not be disappointed by a mechanical and unnecessary application of the federal rule." *Pagano v. Oroville Hosp.*, 145 F.R.D. 683, 688 (E.D.

Cal. 1993) *quoting Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981). The federal courts "should also consider whether there is a consensus among the States in determining whether "reason and experience" supports recognition of a privilege." *Williams*, 760 F.Supp.2d. at 1031 *citing Jaffee v. Redmond*, 518 U.S. 1, 13 (1996).

In regard to medical peer review committees, there is general consensus as to the necessity and importance of protecting their confidentiality as "at least forty-six states [and the District of Columbia] now have statutes that protect" their work from discovery. *Weekoty v. United States*, 30 F.Supp.2d 1343, 1347 (D.N.M. 1998) (modification in original). California is among these states as the California Legislature has adopted Evidence Code § 1157 in recognition of the "public interest in medical staff candor." *Matchett v. Superior Court*, 40 Cal.App.3d 623, 629 (1974). These meetings are entered into by physicians and medical personnel with the "understanding that all communications originating therein are to be confidential." *Bredice v. Doctors Hosp. Inc*., 50 F.R.D. 249, 250 (D.D.C. 1970).

IV. ARGUMENT

A. Self-Critical Analysis Privilege in the Ninth Circuit

1. Existence of the privilege

To date, neither the Ninth Circuit nor the Supreme Court have definitively ruled on whether the self-critical analysis privilege exists. *Dowling v. American Haw. Cruises*, 971 F.2d 423 (9th Cir. 1992). Rather, federal courts either grant or deny the privilege on narrow grounds specific to the facts of the case before them. *Id*. at 425 fn1. In the medical context, most of the Courts that have declined to extend the privilege have done so based upon the fact the peer review process itself was in question. *See e.g. Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993) (privilege does not apply in antitrust lawsuit); *Burrows v. Redbud Cmty. Hosp. Dist.*, 187 F.R.D. 606 (N.D. Cal. 1998) (privilege does not apply in claim of spoilage of evidence linked to medical review committee); *Williams v. Univ. Med. Ctr. Of S. Nev.*, 760 F.Supp.2d 1026 (D. Nev. 2010) (privilege does not apply in a physician's claim of violation of Fourteenth Amendment rights under § 1983 and the Sherman Act.); *Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005) (privilege does not apply in claim of wrongful death of a prisoner as "in the ordinary hospital it may be that the first object of all involved in patient care is the welfare of the patient, in the prison context the safety and efficiency of the prison may operate as goals affecting the care offered.").

The Court in *Pagano* noted that the difference between an antitrust case on the one hand and a medical malpractice case on the other is, "the crucial issue in [a medical malpractice] case is not what occurred at the review proceeding, but whether the defendant was in fact negligent in his care and treatment of the plaintiff." *Pagano*, 145 F.R.D. at 691. Along the same lines, the District Court in the District of Colombia, recognized the privilege should apply in medical malpractice actions, and noted that "what someone at a subsequent date thought of these acts or omissions is not relevant to the case." *Bredice*, 50 F.R.D. at 251 *quoting Richards v. Maine Central R.*, 21 F.R.D. 590 (D. Me. 1957) (modification in original). The Southern District of California recognized a difference between medical malpractice cases and cases where the claim was more dependent upon what was contained in the records of the medical peer review committee meeting itself. *Leon v. County of San Diego*, 202 F.R.D. 631, 636 (S.D. Cal. 2001).

The present is, at its core, a medical malpractice case. Plaintiffs allege the care and treatment Ms. Gutierrez received fell below the standard of care and caused her injuries. Plaintiffs have not made any allegations the medical peer review process is in question or that the medical peer review committee harmed them. Plaintiffs claim Ms. Gutierrez was improperly screened and treated in the emergency department, not that there was any issue or wrongdoing by the medical peer review committee itself after the fact. There are no claims or allegations made that the medical peer review committee committed a wrongful act or instructed another party to commit a wrongful act. Therefore, Defendants respectfully request that this Court recognize the self-critical analysis privilege in this case.

2. Elements of the privilege

While it declined to specifically confirm or deny the existence of the self-critical analysis privilege, the *Dowling* Court's extensive discussion of its elements is informative. The privilege has four elements:

1) The information must result from a critical self-analysis undertaken by the party seeking protection;

2) The public must have a strong interest in preserving the free flow of the type of information sought;

3) The information must be of the type whose flow would be curtailed if discovery were allowed.

4) The general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential. *Dowling*, 971 F.2d at 426.

The Court concluded its discussion by making one of the few definitive comments in regards to the self-critical analysis privilege, specifically, "the difference between pre-accident safety reviews and post-accident investigations is an important one." *Id*. at 427. Routine internal corporate reviews of matters related to safety concerns are not protected by the privilege. *Id*. at 426. The difference between a pre-and post-accident report, and the public policy importance of protecting the post-accident report, is highlighted by the Federal Rule of Evidence 407's prohibition of using subsequent remedial measures to prove negligence. *Id*. at 427. This initial hurdle is easily cleared by medical peer review committee meetings. They are definitionally post-accident and are in place to discuss and critique the handling and responses to patient care.

As for the four elements identified by the *Dowling* court, they all apply to the case at bar, and reason and experience necessitate that the self-critical analysis privilege, "perhaps more properly called the medical peer review privilege," should apply and bar discovery into the peer review meetings and processes of Defendants. *Weekoty v. United States*, 30 F.Supp.2d 1343, 1348 (D.N.M. 1998).

i. Undertaken by the party seeking protection

While this element is rather obviously fulfilled in this matter, a very brief discussion will be included here for completeness. The medical peer review committee in question was formed as part of the SJHS Performance Improvement Plan, which plan encompasses SRMH and is implemented by SRMH. *See* Performance Improvement (PI) Plan attached hereto as Exhibit A. Therefore, as SRMH is seeking protection of any confidential medical peer review held at its facility, it has standing and Defendants respectfully request this Court grant their Motion for a Protective Order.

ii. Public policy favors the privilege

Public policy favors the protection of defendants' peer review in this matter. The *Bredice* Court recognized that public interest may be best protected by "not permitting inquiry into particular matters by discovery." *Bredice*, 50 F.R.D. at 250. There is an "overwhelming public interest" in maintaining the confidentiality of medical peer review committee meetings, which are formed for the purpose of self-improvement, and to encourage the unimpeded flow of ideas and advice. *Id*. at 251, *see also* Exhibit A. The California Legislature has long recognized the importance of encouraging candor at peer review committees by guaranteeing confidentiality. *Matchett*, 40 Cal.App.3d. at 629. The Legislature and Courts have recognized that California Evidence Code § 1157 was "enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity." *Id*. at 629. The *Pagano* Court discussed the rationale behind the *Bredice* Court's grant of privilege in a malpractice action, and distinguished that rational from its own antitrust case. Regarding medical peer review committees, the *Pagano* Court noted that "because such committees were formed pursuant to the Joint Commissions on Accreditation of Hospitals for the "sole objective" of improving available care and treatment for its patients, a matter of overwhelming public interest; and that all communications originating therein are expected to remain confidential, which is essential to the effective functioning of the committees." *Pagano*, 145 F.R.D. at 690 *citing Bredice*, 50 F.R.D. at 250-251.

In *Weekoty*, the court cited to the differences between a dispute over a bank loan and the "life-saving discussions conducted during a [peer review] conference." *Weekoty*, 30 F.Supp.2d 1343 at 1344. The *Weektoy* Court recognized the public good that would result from preserving the confidentiality of these meetings, and that the public good "outweighs the general preference for open discovery." *Id*. at 1348. The *Weekoty* Court also recognized that the preservation of the confidentiality of these meetings is more supportive of the public good than spousal privilege or even attorney client privilege for, while those recognized privileges will protect one or two individuals, open and confidential medical peer review will encourage life-saving improvements for potentially hundreds of individuals. *Id*. at 1346.

Here, the public good weighs heavily in favor of granting the protective order. The Legislature and Courts have recognized there is an overwhelming public good served by assuring that patient care is reviewed and improved through candid, thorough, and unrestrained discussion by the medical peer review committee. Disclosure of the thoughts and opinions expressed by the medical peer review committee in regards to the care provided to Ms. Gutierrez, subsequent to when that care was rendered will have little to no impact on Plaintiffs' case. It could, however, potentially have far-reaching and substantial effects on care provided to thousands of patients presenting to SRMH in the coming weeks, months and years. Therefore, as there is an overwhelming public interest served by granting the privilege and issuing the protective order in this case, Defendants respectfully request that this Court grant their Motion for Protective Order.

iii. Information would be curtailed if discovery were allowed

Allowing discovery into defendant's peer review would curtail defendant's future review of other cases and ultimately jeopardize patient safety. The federal courts recognize that if medical peer review committee meetings were subjected to the discovery process without the requesting party demonstrating exceptional circumstances the result would be termination of such deliberations. *Bredice*, 50 F.R.D. at 250. "Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit." *Id*. The California State Courts reiterated the Legislature's position that "access to peer investigations conducted by staff committees stifles candor and inhibits objectivity." *Matchett*, 40 Cal.App.3d at 629.

The policy underlying the idea of self-critical analysis is based upon the understanding that in certain circumstances it is important to "promote candid and forthright self-evaluation." *Granger v. National R. Passenger Corp.*, 116 F.R.D. 507, 509 (E.D. Pa. 1987). The application of the privilege prevents "a 'chilling' effect on self-analysis and self-evaluation prepared for the purpose of protecting the public by instituting practices assuring safer operations." *Id*. To open the medical peer review committee meetings to discovery would result in physicians not being as frank or candid as they otherwise might be, which would undermine the public good. *Weekoty*, 30 F.Supp.2d at 1346. "Reviewing physicians have an obvious interest in maintaining the confidentiality of their reviews, particularly so as not to become implicated in any civil suit which may arise out of the treating physician's negligence." *Nilavar v. Mercy Health Sys.*, 2010 F.R.D. 597, 600 (S.D. Ohio 2002).

The reasoning behind the above cases applies directly to the case at bar. As part of medical peer review meetings, physicians and nurses are asked to provide candid, honest criticism of their own actions and the actions of colleagues in order to improve medical care provided to future patients. To remove the protections afforded by confidentiality would stifle and curtail the flow of information. Not only would practitioners face concerns of the potential for self-incrimination, but criticism of a colleague's actions could draw them into a possible reputation damaging medical malpractice case. Therefore, as this is the type of information that would be curtailed if discovery is permitted, Defendants respectfully request that this Court grant their Motion for a Protective Order.

iv. The medical peer review was conducted with the expectation it would be kept confidential and it was kept confidential

According to defendant's policy, the peer review in this case and all others is conducted with an expectation of privacy. The Ninth Circuit held that to the three elements above "should be added the general proviso that no document will be accorded a privilege unless it was prepared with the expectation that it would be kept confidential, and has in fact been kept confidential." *Dowling*, 971 F.2d at 426. The *Dowling* Court cited to two separate cases, regarding investigative reports, where the privilege was found to be inapplicable because the analysis was not performed with the intention that it would be kept confidential and was not actually kept confidential. *Id*, *citing Peterson v. Chesapeake & Ohio Ry.*, 112 F.R.D. 360 (W.D. Mich. 1986) and *Westmoreland v. CBS, Inc*., 97 F.R.D. 703 (S.D.N.Y. 1983).

Here, not only does the policy of the State create the expectation of confidentiality but so to do the policies of the hospital. California Evidence Code § 1157, along with the policies of nearly every state in the union, underscores the point that state legislatures recognize the importance of maintaining the confidentiality of medical peer review committees. Further, it is the policy of Defendants to conduct all medical peer review committees in a strictly confidential matter. Exhibit A. Finally, any and all information provided as part of medical peer review committee meetings at SRMH have been, and will be, kept confidential. Exhibit A. Therefore, as medical peer review committee meetings have been conducted with the expectation of confidentiality and have in fact been kept confidential, Defendants respectfully request that this Court grant their Motion for a Protective Order.

V. CONCLUSION

Defendants are neither requesting this Court create a new privilege, nor rule that a specific privilege should apply to all cases moving forward; rather, as is the prerogative of the federal courts under Federal Rule of Evidence 501 and the Supreme Court's decision in *University of Pennsylvania* *v. Equal Employment Opportunity Commission*, Defendants request that this Court depend upon reason and experience to hold that the self-critical analysis privilege should apply and a protective order should be issued in this case, under these particular facts.

Plaintiffs have not alleged the medical peer review committee itself in some way injured them. The deliberations and discussions of the medical peer review committee is, by its nature, a post-incident assessment. Finally, the facts of this case fulfill all of the elements necessary for a privilege to apply: 1) Defendants, the parties seeking the order; 2) there is an overwhelming public interest in maintaining the confidentiality of medical peer review committee meetings; 3) the important information gained through these meetings would be curtailed by discovery as physicians would, at best, be reticent to participate in these meetings if they are not confidential; and 4) SRMH conducts all medical peer review committee meetings in a confidential manner and all information provided in these meetings is kept confidential.

Therefore, Defendants respectfully request that this Honorable Court grant their Motion for a Protective Order and prohibit Plaintiffs to move forward with discovery into their medical peer review committee process.

Respectfully submitted,

Dated: February 7, 2017

LA FOLLETTE, JOHNSON,
DE HAAS, FESLER & AMES

By: */s/*
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